Nos. 90-1801

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1990

BOSTON TEACHERS UNION, LOCAL 66

Petitioners,

v

TALLULAH MORGAN, et al.

Plaintiffs-Respondents,

and

DANIEL R. BURKE, et al.

Defendants-Respondents

On Petition for a Writ of
Certiorari to the United States Court of Appeals
for the First Circuit

RESPONDENT MASSACHUSETTS BOARD OF EDUCATION'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the courts below have determined as a matter of fact that the vestiges of discrimination remain and unitariness has not been achieved in the Boston public schools, does this case present the question of whether a federal court may retain jurisdiction for any period of time after unitariness has been achieved?

2. Where unitariness has not yet been achieved, the Final Judgment on its face provides for its own termination, and petitioner has introduced no facts in the District Court to support its claim that the order in effect is permanent, does this case properly present the question of whether the Final Judgment is permanent?

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The respondent Massachusetts Board of Education respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion and order of the United States Court of Appeals for the First Circuit in this case. That opinion and order is reported at 926 F.2d 86.

STATEMENT OF THE CASE

This case commenced in 1972. The plaintiffs, a class of black Boston public school children and their parents, sued certain defendants including the Boston School Committee, its individual members, and the Superintendent of Schools ("the school defendants"). The present petitioner Boston Teachers Union Local 66, AFT, AFL-CIO ("BTU") subsequently intervened in the United States District Court for

purposes of addressing faculty and staff issues. Morgan v. Kerrigan, 509 F.2d 599, 600 (1st. Cir. 1975). The plaintiffs alleged that they were denied equal protection of the laws and equality of educational opportunity, in violation of U.S. Const. amend. XIII and XIV, and 42 U.S.C. §§1981, 1982 and 2000.

In 1974, the District Court made extensive findings, concluding, inter alia, that the school defendants had knowingly violated the constitutional rights of public school students by engaging in a long-standing pattern of racial discrimination in the recruitment, employment, assignment, transfer and promotion of teachers and administrators. Morgan v. Hennigan, 379

F. Supp. 410, 456-466 (D. Mass. 1974). In affirming these findings, the United States Court of Appeals for the First Circuit stated that Boston's staffing practices

> . . . further combined to buttress the segregated nature of the school system . . . thereby denying to (black) students equal educational opportunity to which they are entitled . . . . Faculty segregation . . . is a significant element in a racially discriminatory system which must be . . . eliminated root and branch.

Morgan v. Kerrigan, 509 F.2d 580, 597-598 (1st Cir. 1974), cert. den. 421 U.S. 963 (1975) (citations omitted).

Having found liability, the District Court proceeded to issue a series of remedial orders throughout the next decade. These orders were designed to "eliminate every form of racial segregation in the Public Schools of

Boston, including all consequences and vestiges of segregation previously practiced by the defendants." Morgan v. Hennigan, supra, 379 F.Supp. at 484. The BTU has unsuccessfully challenged virtually every order directed toward faculty desegregation. Indeed, as described below, this Court has already denied two petitions for writ of certiorari filed by the current petitioner BTU in connection with faculty desegregation orders issued in this case.

The first (interim) faculty desegregation orders, entered in July, 1974, mandated a hiring rate of one new black teacher for each new white teacher hired, and directed proportionate assignment of black faculty throughout the school system. The Court of

Appeals upheld these orders against a BTU challenge, emphasizing that the orders were intended to protect the rights of black Boston Public School children. Morgan v. Kerrigan, supra, 509 F.2d at 600-601.

In 1975, the District Court entered new remedial orders for faculty desegregation, requiring, among other things, a continuation of one-to-one hiring until 20% of the faculty was black, with additional obligations to continue until 25% of the faculty was black. Morgan v. Kerrigan, 388 F.Supp. 581 (D.Mass. 1975). The BTU also appealed this order, specifically questioning the propriety of the 20% hiring goal. The appellate court again affirmed the District Court's order, specifically finding that the 20% hiring

goal was not an abuse of discretion. This Court then denied BTU's petition for writ of certiorari. Morgan v. Kerrigan, 530 F.2d 431, 434 (1st Cir. 1976), cert. den. sub nom, McDonough v. Morgan, 426 U.S. 935 (1976).

In the Spring of 1981, when the percentage of black teachers was 19.09 percent, massive layoffs were contemplated by school officials in response to funding constraints. Recognizing that recent gains in staff desegregation would be erased if layoffs proceeded in accordance with the seniority provisions in applicable contracts, the District Court entered conditional orders requiring that layoffs, if they occurred, be conducted so as to preserve current minority staff percentages. The BTU appealed this

order and the Court of Appeals again affirmed, applying the standards articulated in Milliken v. Bradley, 433 U.S. 267, 280-281 (1977). This Court again denied BTU's petition for certiorari. Morgan v. O'Bryant, 671 F.2d 23 (1st Cir. 1982), cert. den., 459 U.S. 881 (1982).

By 1985, the District Court, which had already withdrawn jurisdiction over specific areas of the remedy in which unitary status had been achieved, chose to remove the remaining aspects of the litigation from its active docket through the issuance of Final Orders. Regarding faculty and staff, the District Court included a paragraph in its Final Orders that reiterated the 25% goal for black employees and articulated a 10% goal for other minority

employees. It called for the maintenance as well as the achievement of these goals, and introduced annual rates of increase for black and other minority teachers and administrators until the specific goals were met. In a subsequent modification of this paragraph, specific staffing levels for black and other minority faculty at each of the three examination schools operated by the Boston Public Schools were introduced. The BTU appealed yet again, raising a variety of contentions, all of which were rejected by the Court of Appeals. Morgan v. Nucci, 831 F.2d 313, 327-332 (1st Cir. 1987). In its opinion, the Court of Appeals stressed a court's obligation in a desegregation case to combat "the lingering effects of past discrimination" and to require

"complete compliance with all outstanding faculty and staff orders" prior to a declaration of unitary status in the area of staffing. Id. at 329 n. 25.

On May 31, 1991, the District Court entered a Final Judgment. Prior to entering the judgment, the District Court considered the comments of all the parties, including those of the Boston school defendants and the BTU. The District Court found that further protection in the area of faculty and staff desegregation was necessary, particularly in light of likely reductions in force threatened by another anticipated budget shortfall. (Pet. App. 19a). The Final Judgment maintains the previously targeted percentages and requirements for annual

percentage increases in faculty and staff. Regarding prospective layoffs and termination of the order, the Final Judgment provides that:

> . . . notwithstanding applicable collective bargaining agreements, [school defendants] shall conduct any reduction in force (RIF) of either faculty or staff in such a manner as to preserve after such RIF substantially the same racial-ethnic proportions of faculty and staff as existed immediately before it; provided that the orders in this paragraph shall expire when black and other minority faculty and staff shall have attained seniority to such an extent that, were a RIF to occur based upon the seniority provisions of applicable collective bargaining agreements reducing faculty and staff by 3% or more, the racial/ethnic proportions of faculty and staff after such a RIF would, in the written opinion of the Superintendent of Schools, be substantially the same as those existing before it.

When the BTU appealed yet again, the Court of Appeals again affirmed, after striking the phrase "or more" following the figure "3%". (Pet. App. 14a).

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision is correct and is wholly consistent with the decisions of this Court. There is no conflict between the circuits that this Court must resolve. Since the petitioner does not challenge the factual finding that "unitariness ha[s] not yet been achieved" (Pet. App. 7a), and the Court of Appeals decision simply applies existing precedent with respect to the eradication of the vestiges of past discrimination, there is no pressing issue of national importance that is presented by this case or that requires this Court's attention. The Court should therefore deny the writ. See Rule 10, Rules of the Supreme Court of the United States.

I. The Court of Appeals Decision Is Fully Consistent With the Decisions of this Court.

Petitioner asserts that the issue presented in this case is whether the courts below exceeded their judicial authority. Yet, petitioner can and does not point to any decision of this Court with which the Court of Appeals decision is inconsistent.

a. A Federal Court Properly Retains Jurisdiction Where, As Here, There Remain Vestiges Of Discrimination And Unitary Status Has Not Been Achieved.

While petitioner cites many decisions of this Court concerning the proper scope of a federal court's remedial power in school desegregation cases (Pet. 10-12), it does not contend that the Court of Appeals decision is inconsistent with any of them, nor could it. The factual finding on the record before this Court is that the vestiges of discrimination remain, and that

unitariness has not been achieved in the Boston Public Schools. (Pet. App. 7a). The Court of Appeals reached this conclusion by measuring the school system's progress against the numerical goals set forth in the 1985 Final Orders and found significant shortfalls. (Pet. App. 6a-7a).[1/] Whether or not the Final Judgment "redefine[d] the concept of unitariness" (Pet. 13) by incorporating

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1/ The shortfalls are detailed in the opinion of the Court of Appeals. (Pet. App. 5a-7a). The finding that the shortfalls were significant was not based solely, as petitioner would have it (Pet. 14), on a finding that the 25% systemwide goal for black teachers had not been met. Rather, the Court of Appeals found that shortfalls appeared in six of the twelve staffing catagories covered by the order: black faculty systemwide, other minority principals and headmasters, black faculty at two of three examination schools, and other minority faculty at all three examination schools. (Pet. App. 5a-6a).

a layoff provision, the fact remains that even under the 1985 standard, unitariness has not been achieved. Hence, this case does not present the issue of whether the District Court could retain jurisidiction over this case if unitariness had in fact been achieved.

The decision of the Court of Appeals is therefore fully consistent with this Court's recent reaffirmation of the principle that the federal courts' remedial authority extends to eliminating conditions that violate the Constitution "or flow from such a violation." Board of Education Oklahoma City Public Schools v. Dowell, 111 S.Ct. 630, 637 (1991).[2/]

2/ Petitioner baldly asserts at various places in the Petition that the "authorities are no longer operating a dual school system and have eliminated

(footnote continued)

b. The Final Judgment Is Not An Impermissible Permanent Order.

The order below does not construct permanent racial ratios.[3/] On its face the order provides for its expiration. (Pet. App. 17a). While

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(footnote continued)

its vestiges." (Pet. 10, 20). This completely ignores the factual findings below. (Pet. App. 7a). In addition, petitioner does not seek certiorari on the question of whether the contrary factual findings of the courts below were clearly erroneous, and points to no basis for a conclusion that the factual findings are clearly erroneous. Nor would such a question justify the granting of a petition. Rule 10, Rules of the Supreme Court.

3/ Petitioner relies on dicta in a footnote in Milliken v. Bradley, 433 U.S. 267, 280 n. 14 (1977) to support the argument that such an order would violate the law. There, however, the Court was referring to a hypothetical situation in which there was no finding of intentional discrimination, but a finding of "racial imbalance" alone. Id. This is not the situation presented here. A finding of intentional discrimination is the predicate for this entire case.

petitioner may not approve of the standard used by the District Court to decide when the order shall expire, that is quite different from the order being permanent. Certainly this Court has never held that it is in excess of a federal court's authority to establish a standard for unitariness that would ensure more than momentary compliance with specific numerical goals. Otherwise, as the Appeals Court recognized, "the entire exercize, into which so many had invested so much, could well prove to be a painful charade." (Pet. App. 11a). Indeed, Dowell states that a federal court may properly require compliance with its orders "for a reasonable period of time . . . to remedy the effects of past intentional discrimination." Board of

Education Oklahoma City Public Schools v. Dowell, 111 S.Ct. at 637. In this case, once the standard set forth in the order for expiration is met, by definition the vestiges of past discrimination are deemed to be eliminated, and the order by its own language shall terminate.[4/]

Petitioner also argues that the standard for termination is illusory, and inadministrable due to the complexities of the collective bargaining agreement. (Pet. 14-15). The Court of Appeals correctly rejected this "highly technical" argument as follows:

4/ The Court of Appeals expressed its appreciation for non-permanence as early as 1975 when it identified the standard in the remedial order as providing "a built-in terminus for court responsibility". Morgan v. Kerrigan, supra, 530 F.2d at 434.

> We merely observe that since 1981 layoffs have been accomplished in such a way as to preserve existing percentages, that presumably predicting the effect of a 3% layoff would pose no greater challenge, and that the School Defendants, who must be relied upon to implement the order, have raised no objection."

(Pet. App.13a)[5/]

c. The Question of Whether The Termination Provisions Of The Final Judgment Are Workable As A Practical Matter Is Not Ripe For Review.

The record is bare of any facts to support the petitioner's claim that the 3% layoff mechanism is unworkable. This issue was never even raised before the District Court. (Pet. App. 67a-71a).

However, even if the mechanism adopted by the District Court for

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5/ No party, including Boston Public School officials, argued to the District Court that the specific percentage goals were inappropriate or impossible to achieve; and the District Court specifically found that complete compliance was in reach. (Pet. App. 7a).

termination of its power creates a situation where jurisdiction will continue after unitariness has been reached, the time and place to raise that matter is before the District Court once the numerical goals have been achieved and there has been some effort to apply the District Court's termination formula. It is simply premature to raise the issue now.

II. There Is No Conflict Between the Lower Court Decision and the Decisions of Other Courts of Appeals.

Petitioner argues that the decision below creates a split in the circuits on the question of whether federal court jurisdiction can continue "once unitariness is achieved." (Pet. 20). But as stated above, the First Circuit and the District Court found that unitariness has not been achieved in

this case. Hence, the issue on which petitioner contends there is a conflict in the circuits is simply not raised in this case; and, certainly, the decision below creates no such conflict.

Even assuming, however, that technical compliance with the standards for measuring unitariness had been achieved, it would be perfectly consistent with the decisions of other Courts of Appeals for the District Court to retain jurisdiction for a period of time to ensure that compliance is not an aberrational or momentary phenomenon. See Quarles v. Oxford Mun. Separate School Dist., 868 F.2d 750, 752 (5th Cir. 1989); Ross v. Houston Indep. School Dist., 699 F.2d 218, 227 (5th Cir. 1983); Pitts v. Freeman, 887 F.2d 1438, 1446 n.9 (11th Cir. 1989). As the

Court of Appeals found the District Court's order does no more than than that which has been upheld by these other Courts of Appeals. (A. 10a-12a),.

The core of petitioner's complaint appears to be that the First Circuit's affirmance of the District Court's most recent decision is somehow in conflict with its own prior decisions in this very case. However, as the Court of Appeals held, the most recent District Court order is not at all inconsistent with or different from its earlier orders setting standards for judging when unitariness and compliance would be achieved. (Pet. App. 10a -12a). Rather, the most recent orders represent a "further definition" and "fine tuning" of the earlier orders. (Id.).

As the Court of Appeals found, petitioner's arguments would create "a trap or straitjacket for a court if it could not interpret prior general concepts in light of later events." (Pet. App. 12a). Neither the law of this Court, nor of any United States Court of Appeals, prevent a federal court from interpreting and clarifying its own orders in subsequent proceedings.

Even if there were a conflict between two decisions of the First Circuit Court of Appeals, however, that would not warrant the granting of the petition. Rule 10(a) contemplates only situations in which there is a conflict with the decision of another United States Court of Appeals.

CONCLUSION

For all the foregoing reasons, the

petition for writ of certiorari should be denied.

Respectfully Submitted,

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